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TIDALMARINE ENGINEERING SDN BHD v. KERAJAAN MALAYSIA (JABATAN KERJA RAYA MALAYSIA)

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
ABDUL RAHMAN SEBLI JCA
B MARY LIM JCA
[CIVIL APPEAL NO: W-01(C)(A)-301-08-2017]
27 NOVEMBER 2018

C ***ARBITRATION:*** *Award – Setting aside – Application for – Arbitrator heard and decided on issue of termination of contract – Whether arbitrator decided on dispute contemplated by or falling within terms of submission – Whether award in clear excess of jurisdiction – Whether arbitrator's conclusion required appellate intervention – Arbitration Act 2005, s. 42*

D In 2007, the appellant ('the plaintiff') and the respondent ('the defendant') had entered into a contract for the construction of an expressway for a consideration of RM169,232,896.95. The plaintiff was to complete the works within 130 weeks, from 16 June 2007 to 1 December 2009. Clause 53 of the conditions of contract ('COC') allowed for the fluctuation of prices for five materials. However, due to the increase in the price of construction E materials, the defendant, by way of a treasury circular, allowed variation to six more items. The treasury circular also allowed the contractors to apply for extension of time for not more than three months and the option for mutual termination. The contract period was extended twice and the new completion date was 11 March 2011. In 2009, the plaintiff suspended works F on the grounds that, when the plaintiff entered into the contract with the defendant, its expectation was on the basis that all the prices of materials would be adjusted if it was found that there was a need to make adjustment. The defendant issued a notice of default, followed by a determination notice pursuant to cl. 51(a)(i) of the COC. The defendant then demanded from the G plaintiff RM7,225,591.55, being the full amount of the performance bond. The bond was encashed in 2012. According to the defendant, the contract was validly determined due to the plaintiff's continuing default. The plaintiff argued that the suspension of works was with reasonable basis and the determination was unlawful. The dispute between the parties were referred H to arbitration. The plaintiff claimed against the defendant for, *inter alia*, (i) cost overrun and loss incurred due to the price increase; (ii) works done by the plaintiff but not paid by the defendant; (iii) loss of profit and business opportunities; and (iv) payment of performance bond. The defendant counterclaimed for, *inter alia*, the new completion cost for the works and the adjustment of the original contract sum. Dismissing both the plaintiff's claim I and the defendant's counterclaim, the arbitrator found that (i) the plaintiff ceased all works by end of October 2009; (ii) the defendant had wrongfully

terminated the contract and the termination was bad in law; (iii) the suspension of the works, *per se*, before completion, was not a default in the context of cl. 51(a)(i) and since the default notice omitted to state specifically that the default was the 'suspension without reasonable cause', the default notice issued by the defendant was invalid and the consequent determination of the plaintiff's employment was also invalid. No damages were awarded to the plaintiff for the wrongful termination but the arbitrator allowed the defendant to retain the sums guaranteed under the performance bond. Dissatisfied with the arbitration award, the plaintiff applied to the High Court, to set aside part of the award, pursuant to s. 42 of the Arbitration Act 2005. The High Court dismissed the plaintiff's application after finding that there were no questions of law that required the court's intervention. Hence, the present appeal. The issues that arose for adjudication were (i) whether, given that the termination was wrongful, the defendant could retain the performance bond amount, refuse to compensate the plaintiff for the works done and/or make payment for loss of profit; (ii) whether the arbitrator may impose liquidated damages on the plaintiff when no such claim was made by the defendant and when no certificate of non-completion ('CNC') was issued; and (iii) what should be the measure of damages as a result of the wrongful termination of the agreement dated 16 November 2007 by the defendant.

Held (allowing appeal)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) The arbitrator concluded that the defendant was entitled to the performance bond and the defendant's utilisation of the performance bond was not unlawful. As a matter of law, the arbitrator was not entitled to reach the conclusions that he did. The lawfulness of the utilisation of the performance bond depended on the terms of the COC, how the parties raised the issue and what the responses were. It was not open to the arbitrator to dwell into areas or consider any other provisions of the COC which were not relied on, pleaded or counterclaimed. (paras 50 & 51)

(2) The arbitrator had found that the determination was invalid. Given such a finding, which remained unchallenged, the defendant would not, in law, be entitled to claim for its losses, including costs incurred in mitigating its losses. The arbitrator failed to have regard to the fact that the defendant called and utilised the performance bond for its 'additional costs' in completion. The defendant was to bear those costs itself. While the defendant's right to cash in on the performance bond was said to be related to the losses apparently suffered by the defendant, and not related to termination, the encashment of the performance bond after the termination, together with the pleas and submissions taken by the defendant, indicated that the performance bond was utilised to cover the defendant's losses. Under such circumstances, the law does not countenance the result and conclusion reached by the arbitrator. (paras 54 & 55)

(3) There was no legal basis for the arbitrator to consider and justify the utilisation of the performance bond. There was no plea or counterclaim to this effect and, in any event, the conditions for such an imposition were not met. No CNC was issued and, more importantly, the date of completion had yet to lapse when the contract was determined. The final award was varied to the extent that the plaintiff's claim for payment of the performance bond was allowed. (paras 56 & 59)

Bahasa Malaysia *Headnotes*

Pada 2007, perayu ('plaintif') dan responden ('defendan') memeterai satu kontrak pembinaan lebuh raya dengan balasan sebanyak RM169,232,896.95. Plaintif perlu menyiapkan kerja-kerja dalam 130 minggu, dari 16 Jun 2007 hingga 1 Disember 2009. Klausa 53 syarat-syarat kontrak ('SSK') membenarkan perubahan harga lima bahan. Walau bagaimanapun, susulan kenaikan harga bahan-bahan binaan, defendan, melalui satu pekeliling perbendaharaan, membenarkan pengubahan enam lagi item. Pekeliling perbendaharaan ini juga membenarkan kontraktor-kontraktor memohon lanjutan masa tidak lebih tiga bulan dan pilihan penamatan bersama. Tempoh kontrak dilanjutkan dua kali dan tarikh siap baharu ialah 11 Mac 2011. Pada 2009, plaintif menggantung kerja-kerja atas alasan, apabila memeterai kontrak dengan defendan, jangkaan plaintif ialah atas alasan semua harga bahan-bahan akan diselaraskan jika didapati penyelarasan perlu dibuat. Defendan mengeluarkan notis keingkaran, diikuti oleh notis penamatan bawah kl. 51(a)(i) SSK. Defendan seterusnya menuntut daripada plaintif RM7,225,591.55, iaitu jumlah penuh bon pelaksanaan. Bon pelaksanaan ditunaikan pada 2012. Menurut defendan, kontrak ditamatkan secara sah berdasarkan keingkaran berterusan plaintif. Plaintif menghujahkan penggantungan kerja-kerja adalah atas alasan munasabah dan penamatannya tidak sah. Pertikaian pihak-pihak dirujuk pada timbang tara. Plaintif menuntut terhadap defendan, antara lain, (i) limpahan kos dan kerugian yang dialami akibat kenaikan harga; (ii) kerja-kerja yang dijalankan oleh plaintif tetapi tidak dibayar oleh defendan; (iii) kerugian keuntungan dan kehilangan peluang perniagaan; dan (iv) bayaran bon pelaksanaan. Defendan menuntut balas, antara lain, kos baharu penyiapan kerja-kerja dan penyelarasan jumlah asal kontrak. Menolak tuntutan plaintif dan tuntutan balas defendan, penimbang tara mendapati (i) plaintif menghentikan kerja-kerja pada hujung Oktober 2009; (ii) defendan, secara salah, menamatkan kontrak dan penamatan ini tidak sah; (iii) penggantungan kerja-kerja sendiri, sebelum penyiapannya, bukan keingkaran dalam konteks kl. 51(a)(i) dan oleh kerana notis keingkaran gagal menyatakan, secara spesifik, keingkaran ialah 'penggantungan tanpa kausa munasabah', notis keingkaran yang dikeluarkan oleh defendan tidak sah dan penamatan perkhidmatan plaintif, susulan itu, tidak sah. Tiada ganti rugi yang diawardkan kepada plaintif untuk penamatan tidak sah tetapi penimbang tara membenarkan defendan menyimpan jumlah yang dijamin bawah bon pelaksanaan. Tidak berpuas hati dengan award timbang tara, plaintif memohon di Mahkamah Tinggi, untuk mengetepikan

sebahagian award, bawah s. 42 Akta Timbang Tara 2005. Mahkamah Tinggi menolak permohonan plaintif selepas memutuskan tiada soalan undang-undang yang mewajarkan campur tangan mahkamah. Maka timbul rayuan ini. Isu-isu berbangkit untuk diputuskan adalah (i) sama ada, oleh kerana penamatan tidak sah, defendan boleh menyimpan jumlah bon pelaksanaan, enggan memampas plaintif untuk kerja-kerja dan/atau membuat bayaran kerugian keuntungan; (ii) sama ada penimbang tara boleh mengenakan ganti rugi jumlah tertentu atas plaintif sedangkan tuntutan sedemikian tidak dibuat oleh defendan dan sijil perakuan tak siap kerja ('CNC') tidak dikeluarkan; dan (iii) apakah yang harus menjadi perkiraan ganti rugi akibat penamatan tidak sah perjanjian bertarikh 16 November 2007 oleh defendan.

Diputuskan (membenarkan rayuan)
Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Penimbang tara memutuskan defendan berhak atas bon pelaksanaan dan penggunaan bon pelaksanaan oleh defendan juga bukan tidak sah. Sebagai hal perkara undang-undang, penimbang tara tidak berhak membuat keputusan tersebut. Kesahan penggunaan bon pelaksanaan bergantung pada terma-terma SSK, bagaimana pihak-pihak membangkitkan isu tersebut dan apakah respon-responnya. Tidak terbuka buat penimbang tara membicarakan tentang bidang atau mempertimbangkan apa-apa peruntukan lain SSK yang tidak dijadikan sandaran, diplidkan atau dituntut balas.

(2) Penimbang tara memutuskan penamatan tidak sah. Berdasarkan dapatan ini, yang kekal tidak dicabar, defendan tidak, bawah undang-undang, berhak menuntut kerugian, termasuk kos yang dibelanjakan untuk mengurangkan kerugian. Penimbang tara gagal mengambil kira fakta defendan telah membangkitkan dan menggunakan bon pelaksanaan untuk 'kos tambahan' dalam penyiapan. Defendan sepatutnya menanggung sendiri kos tersebut. Walaupun hak defendan menunaikan bon pelaksanaan dikatakan berkait dengan kerugian yang dikatakan dialami oleh defendan, dan tiada kaitan dengan penamatan, penunaian bon pelaksanaan, selepas penamatan, bersama-sama dengan pli dan hujahan defendan, menunjukkan bon pelaksanaan digunakan untuk menampung kerugian defendan. Dalam hal keadaan ini, undang-undang tidak bersetuju dengan keputusan dan kesimpulan yang dicapai oleh penimbang tara.

(3) Tiada asas undang-undang untuk penimbang tara pertimbangkan dan menunjukkan kewajaran penggunaan bon pelaksanaan. Tiada pli atau tuntutan balas tentang ini dan, dalam apa-apa keadaan, syarat-syarat pengenaan sedemikian tidak dipenuhi. CNC tidak dikeluarkan dan, lebih penting lagi, tarikh siap belum luput semasa kontrak ditamatkan. Award akhir diubah sekadar membenarkan tuntutan plaintif terhadap bayaran pelaksanaan bon.

Case(s) referred to:

Chain Cycle Sdn Bhd v. Kerajaan Malaysia [2016] 1 CLJ 218 CA ***(refd)***

Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 CLJ 693 FC ***(refd)***

Tai Wah Construction Co v. Government of Malaysia (Jabatan Kerja Raya Sarawak) [2004] 3 CLJ 489 CA ***(refd)***

Legislation referred to:

Arbitration Act 2005, s. 42

Contracts Act 1950, s. 54

For the appellant - Sanjay Mohan, K Gobinath & Adam Lee; M/s Mohanadass Partnership

For the respondent - Nadia Hanim Mohd Tajuddin & Rafidah Che Aziz; SFCs

[Editor's note: For the High Court judgment, please see Tidalmarine Engineering Sdn Bhd v. Kerajaan Malaysia [2018] 1 LNS 598 (overruled).]

Reported by Najib Tamby

JUDGMENT

Tengku Maimun Tuan Mat JCA:

Introduction

[1] This was an appeal by the appellant/plaintiff against the decision of the High Court in dismissing its application under s. 42 of the Arbitration Act 2005 ("AA 2005").

The Background Facts

[2] The appellant ("the plaintiff") and the respondent ("the defendant") had entered into a contract dated 16 November 2007 for the construction of an expressway of "Projek Lebuhraya Pantai Timur Fasa 2, Terengganu Pakej 3: Dari CH 26,100 (Ladang Ketengah Perwira) ke CH 40,038 (Stesyen Penyelidikan MARDI) Daerah Kemaman, Terengganu Darul Iman ("the works") for a consideration of RM169,232,896.95.

[3] The plaintiff was to complete the works within 130 weeks commencing from 16 June 2007 to 1 December 2009.

[4] Clause 53 of the conditions of contract ("COC") allows for the fluctuation of prices for five materials ie, cement; steel; automotive gas oil (diesoline); fuel oil (light and medium) and bitumen.

[5] Due to the increase in the price of construction materials, the defendant, by Treasury Circular No. 3/2008 ("the Treasury Circular"), allowed variation to six more items, namely (i) premix asphaltic concrete and premix bituminous macadam; (ii) sand; (iii) aggregates and crushed aggregates; (iv) water pipe and sewerage pipe; (v) corrugated steel beam guardrail and (vi) high yield steel fabric.

[6] The Treasury Circular also allowed contractors to apply for extension of time for not more than three months and the option for mutual termination.

[7] The plaintiff and the defendant had entered into a supplementary agreement on 1 November 2008 to include the six items under the Treasury Circular.

[8] The contract period was extended twice. The new completion date after the second extension was 11 March 2011.

[9] On 28 October 2009, the plaintiff suspended works. The plaintiff contended that its suspension was justified and on reasonable cause(s) amongst which was its expectation that when the plaintiff entered into the contract with the defendant, it was on the basis that all the prices of materials would be adjusted if it is found that there is a need to make the adjustment.

[10] The defendant issued a notice of default dated 12 February 2010 followed by a determination notice dated 11 May 2010. The determination by the defendant of the plaintiff's employment was purportedly under cl. 51(a)(i) of the COC which provides that if the contractor 'without reasonable cause suspends the carrying out of the whole or any part of the works before completion' a default notice can be given followed by a notice determining the employment of the contractor. Thereafter, the defendant made a demand on the full amount of the performance bond of RM7,225,591.55. The bond was encashed on 4 December 2012.

[11] The defendant's position was that because of the plaintiff's continuing default, the contract was validly determined. The plaintiff, on the other hand took the position that the suspension of works was with reasonable basis and that the determination was unlawful.

[12] The dispute between the parties was referred to arbitration. By para. 49 of the re-amended points of claim, the plaintiff claimed against the defendant for *inter alia* cost overrun and loss incurred due to the price increase; for work done by the plaintiff but not paid by the defendant; for loss of profit; for loss of business opportunity; and for payment of performance bond. The defendant counterclaimed for *inter alia* the new completion cost of the works and the adjustment of the original contract sum.

[13] The learned arbitrator, on the concession of the plaintiff that because it had exhausted all its resources including all of its capital reserves due to the extraordinary cost increase, found that the plaintiff had ceased all work by end of October 2009. However, the learned arbitrator also found that the defendant had wrongfully terminated the contract and as such the termination was bad in law. The arbitrator found that suspension of the works *per se* before completion is not a default in the context of cl. 51(a)(i) and since the default notice omitted to state specifically that the default was the 'suspension

without reasonable cause', the default notice issued by the defendant was invalid and that the purported consequent determination of the plaintiff's employment was also invalid.

[14] Nonetheless, the arbitrator dismissed both the plaintiff's claim and the defendant's counterclaim. No damages was awarded to the plaintiff for the wrongful termination but the arbitrator allowed the defendant to retain the sums guaranteed under the performance bond.

[15] Dissatisfied with the arbitration award, the plaintiff filed an application in the High Court to set aside part of the award under s. 42 of the AA 2005.

The Section 42 Application

[16] *Vide* the s. 42 application, the plaintiff referred the following questions for determination of the High Court:

(i) Whether as a matter of law given that the termination was wrongful can the defendant retain the performance bond amount, refuse to compensate the plaintiff for work done and/or make payment for loss of profit?

(ii) Whether as a matter of law the arbitrator may impose liquidated damages on the plaintiff when no such claim was made by the defendant and when no certificate of non-completion ("CNC") was issued?

(iii) As a matter of law, what should be the measure of damages as a result of the wrongful termination of the agreement dated 16 November 2007 by the defendant?

(iv) Whether the defendant is liable to compensate the plaintiff pursuant to s. 54 of the Contracts Act 1950 for losses sustained by the plaintiff due to difficulties and hardship in the performance caused by the acts or circumstances created by the defendant?

(v) Whether, in law, the defendant is liable to compensate the plaintiff for cost escalation resulting from or due to statutory and/or regulatory implementation or Government announcements that were not foreseeable by the plaintiff at the date of the tender?

(vi) Whether the doctrine of sanctity of contract is so rigid to the extent that implied terms can no longer be invoked even in a situation where the term is obviously necessary to achieve the intention of the contract or when the terms were necessary to give business efficacy to the transaction or objective of the contract?

(vii) Whether as a matter of law the arbitrator can reject the application of implied terms to a contract?

(viii) Whether as a matter of law can an arbitrator decide an issue by making reference to laws of foreign jurisdiction such as "French laws that was adopted by the European courts"?

(ix) Whether it is proper as a matter of law for an arbitrator to reach a conclusion based on assumptions?

(x) Whether the basis applied by the arbitrator is an acceptable method of assessing the measure of damages?

(xi) Whether as a matter of law the plaintiff is entitled to rely on either the doctrine of estoppel and/or legitimate expectation as a result of the conduct and representation made by the defendant?

(xii) Whether as a matter of law, a sole arbitrator is entitled to consider and take into account facts favourable to one party and ignore facts favouring the opposing party?

(xiii) Whether in a reasoned award the arbitrator may decide part of the issues and/or claims without fully addressing and assigning reasons therefor?

Findings Of The High Court

[17] On question (i) in respect of the performance bond, the learned judge relied on *Tai Wah Construction Co v. Government of Malaysia (Jabatan Kerja Raya Sarawak)* [2004] 3 CLJ 489 to hold that even though the arbitrator found the termination not lawful, it does not mean that the plaintiff was entitled to the performance bond or the proceeds thereof. The plaintiff, according to the learned judge, must establish how it is entitled to the proceeds of the performance bond which the plaintiff has failed to do.

[18] The arbitrator considered cl. 37 of the contract on performance bond and found that the utilisation of the performance bond is not tied to the determination of the plaintiff's employment. The arbitrator further found that the plaintiff had abandoned works in late October 2009 and that the amount due for liquidated and ascertained damages ("LAD") alone is significantly more than the amount of the performance bond.

[19] The learned judge opined that since the arbitrator has given his reasons as to why the utilisation of the performance bond is not wrongful, his findings should not be disturbed. The learned judge also considered that the plaintiff had challenged the defendant's call on the performance bond and that the plaintiff's claim in that regard had been dismissed by the court.

[20] As such, the learned judge found that there was no error of law in the interpretation and findings of the arbitrator.

[21] On damages, the plaintiff's claim was premised on the defendant's alleged breaches of contract, *inter alia*, in not extending the fluctuation of price clause to all essential materials and/or in not increasing the contract

price and/or that the determination of the plaintiff's employment was *mala fide* and was consequent to a conspiracy by the defendant and/or its servants and agents.

[22] The learned judge found that the arbitrator had made a finding that the plaintiff has failed to establish the said breaches of the contract upon which the claim for damages are based upon. The arbitrator also made a finding of fact that the losses alleged to be suffered by the plaintiff perhaps could be because the plaintiff had under-tendered and/or failed to allow for the possibility of fluctuation of the price of essential materials and that on the evidence, there was nothing to attribute the plaintiff's losses to any acts or omission of the defendant.

[23] In relation to question (ii), the plaintiff contended that in arriving at his conclusion that the demand on the performance bond was not linked to the termination of the contract but to the delay of the progress of the works, the arbitrator was of the view that the defendant would be entitled to impose LAD. The plaintiff contended that the defendant's entitlement to the LAD was not a pleaded issue.

[24] In this respect, the learned judge found that question (ii) is misleading as the arbitrator did not impose any LAD on the plaintiff. Her Ladyship agreed with learned Senior Federal Counsel for the defendant that a reference to LAD in determining the utilisation of the performance bond does not mean that the arbitrator had imposed LAD on the plaintiff, but had merely provided a comparison to show that if the defendant did claim for LAD, the amount due to the defendant will be more than the amount of the performance bond. The learned judge therefore held that question (ii) does not arise from the award.

[25] As for question (iii) on whether the plaintiff was entitled to damages as a result of the wrongful termination of the contract by the defendant, the learned judge agreed with the defendant that what is the appropriate measure of damages is a finding of fact made by the arbitrator and not a question of law.

[26] Questions (iv) and (v) were in relation to the plaintiff's contention that its suspension of works was for reasonable causes namely:

(i) The defendant's failure to extend the fluctuation of price clause to all materials;

(ii) The legitimate expectation that the fluctuation of price clause would be extended to all materials; and

(iii) The legitimate expectation that the contract price would be increased.

[27] The learned judge found that the arbitrator had considered all these contentions and ruled that there was no evidence to support the plaintiff's contentions. These being findings of fact, the learned judge declined to disturb.

[28] In respect of questions (vi), (vii) and (viii) which were premised on implied terms of the contract, the learned judge found that as the plaintiff did not submit on these questions, they are deemed to have been abandoned. In any event, the learned judge found that the issues in the above questions have been dealt with by the arbitrator whereby he found that although the defendant had the power to extend the fluctuation of price clause to other materials, there was nothing, express or implied that supports the plaintiff's contention that the defendant was obliged to do so. The learned judge found that the plaintiff has failed to show in what manner the learned arbitrator had made an error in the application of the law on implied terms.

[29] On questions (ix) and (x), the learned judge found that they are not questions of law but are findings of fact.

[30] Question (xi) was on doctrine of estoppel and/or legitimate expectation. The arbitrator found that there was no basis for the plaintiff to contend that it was led to believe that it had a legitimate expectation that the contract price will be increased. This finding, according to the learned judge, was made upon careful scrutiny of the alleged meetings and letters relied by the plaintiff and other relevant exchange of communications, the numerous minutes of site meetings, and the contents of the letters and memoranda in respect of delays. These are findings of fact which the court cannot disturb and with these findings, the learned judge held that there was no basis to invoke the doctrine of estoppel and/or legitimate expectation.

[31] The plaintiff did not submit on question (xii) and in any event the learned judge found that the arbitrator had decided the issues raised with solid legal reasoning.

[32] On question (xiii), the learned judge found that the plaintiff's complaint was primarily based on a finding of fact by the arbitrator.

[33] Having found that there were no questions of law that require the court's intervention under s. 42 of the AA 2005, the learned judge dismissed the plaintiff's application.

[34] Aggrieved, the plaintiff filed an appeal to this court. We heard the appeal and had unanimously allowed it. Our reasons now follow.

The Appeal

[35] Before us, the plaintiff confined its appeal to the following questions of law:

(i) Whether as a matter of law given that the termination was wrongful can the defendant retain the performance bond amount, refuse to compensate the plaintiff for the work done and/or make payment for loss of profit? (question 1)

A (ii) Whether as a matter of law the arbitrator may impose liquidated damages on the plaintiff when no such claim was made by the defendant and when no CNC was issued? (question 2)

(iii) As a matter of law, what should be the measure of damages as a result of the wrongful termination of the agreement dated 16 November 2007 B by the defendant? (question 3)

[36] In *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693, the Federal Court at p. 753 stated that one of the following (which was not an exhaustive list), would C meet the paradigm of 'any question of law' in s. 42:

(a) a question of law in relation to matters falling within (2) of Mustil J's three-stage test [in "*The Chrysalis* [1983] 2 All ER 658];

(b) a question as to whether the decision of the tribunal was wrong (*The Chrysalis*):

D (c) a question as to whether there was an error of law, and not an error of fact (*Micoperi*); error of law in the sense of an erroneous application of law;

(d) a question as to whether the correct application of the law inevitably leads to one answer and the tribunal had given another (*MRI Trading*); E

(e) a question of law as to the correctness of the law applied;

(f) a question as to the correctness of the tests applied (*Canada v. Southam*);

(g) a question concerning the legal effect to be given to an undisputed F set of facts (*Carrier Lumber*);

(h) a question as to whether the tribunal has jurisdiction to determine a particular matter (*Premiums Brands*): this may also come under s. 37 of AA 2005;

(i) a question of construction of a document (*Intelek*).

G **[37]** It was submitted for the plaintiff that the questions of law posed meet the threshold requirements of s. 42 of the AA 2005 as enunciated by the Federal Court.

[38] Question 1 relates to whether as a matter of law, the arbitrator may H impose liquidated damages on the plaintiff when no such claim was made by the defendant and when no CNC was issued. It was submitted for the plaintiff that the arbitrator had incorrectly concluded that as the amount of LAD suffered by the defendant is well over the amount of the performance bond, the utilisation of the performance bond which is not tied to termination, was not wrongful. I

[39] On question 2, the plaintiff essentially argued that as a matter of law, the defendant cannot profit from its own breach. It therefore must follow that the defendant having unlawfully terminated the contract which resulted in the dismissal of its counterclaim, must compensate the plaintiff for the work carried out and must return the performance bond.

[40] On question 3, it was contended for the plaintiff that given the fact that the defendant had wrongfully terminated the contract, this must mean as a matter of law but for the wrongful termination the plaintiff would have been able to carry out and complete the works. Therefore the finding of the arbitrator that the appellant is not entitled to its claim is incorrect.

[41] The plaintiff in this case had submitted the necessary claims to the defendant premised on works carried out prior to the wrongful termination of the contract by the defendant. It was submitted that the plaintiff was entitled to be paid for the work which it had carried out. And that as a result of the wrongful termination which resulted in the dismissal of the defendant's counterclaim, the plaintiff is entitled to recover the value of work carried out, the costs incurred and the return of the value of the performance bond.

[42] In response, learned Senior Federal Counsel submitted that the plaintiff's claim centered on fluctuation of price and that damages are findings of fact which do not fall under s. 42 of the AA 2005. There was no error by the learned judge and that this court should not disturb the findings of fact by the arbitrator.

Our Decision

[43] Whilst we accept that the issue of damages or rather what is the appropriate measure of damages is an issue of fact which belongs to the domain of the arbitrator and hence we ought not to revisit nor disturb the findings of the arbitrator, (see *Far East Holdings Bhd (supra)*; *Chain Cycle Sdn Bhd v. Kerajaan Malaysia* [2016] 1 CLJ 218; [2016] 1 MLJ 681), we were unanimous in our decision that questions 1 and 2 are questions of law within s. 42 of the AA 2005.

[44] Questions 1 and 2 were actually questions in relation to the performance bond. Question 1 raised the issue whether as a matter of law, the defendant was entitled to retain the proceeds of the performance bond given that its counterclaim was dismissed by the arbitrator. Question 2 was in relation to whether, as a matter of law, the proceeds of the performance bond could be retained by the defendant as the amounts due to the respondent 'using the agreed provisions for the calculation of the LAD' when the defendant's entitlement to the LAD was not a pleaded issue.

[45] The arbitrator considered the issue of utilisation of the performance bond in the following manner:

> 49.1 Clause 37 of the Contract is in respect of the Performance Bond to be provided by the Contractor.

A The relevant portion of Clause 37 (c) of the Conditions of Contract is as follows:

> If a Contractor fails to execute the Contract or commits any breach under the Contract, the Government or S.O. … may utilise and make payments out of … the said Performance Bond … in
B accordance with the terms of the Contract.

> 49.2 It is particularly to be noted that the utilisation of the Performance Bond is not tied to the termination of the employment of the Contract. Clause 40 of the Conditions of Contract provides that if the Contractor fails to complete the Works by the date of completion, the Contractor
C shall pay the Liquidated and Ascertained Damages (LAD) for the period during which the Works have remained incomplete and the S.O. may certify the amount of LAD due to the Respondent.

> 49.3 As has been seen, it is my finding that the Claimant Contractor had, well before completion, abandoned the Works in or about October 2009, and certainly had done so by the 12 of February 2010. The evidence of
D RW6, Abdul Kadir bin Abdul Samad is that at the relevant period he was the S.O's representative for the project. In due course he issued revision 2 of the Final Certificate in respect of the Contract, full particulars of which are given in his Witness Statement. If, in fact the Claimant had abandoned the Works and I have found that it did abandon the Works in late October 2009, when only some 33% of the Works had been
E completed, there is no question but that, using the agreed provisions for calculation of the Liquidated and Ascertained Damages which is provided in the Appendix to the Conditions of Contract, the amounts due to the Respondent as LAD alone, is significantly more than the amount of the Performance Bond.

F …

> …

> 49.6 As clearly the amount of LAD suffered by the Respondent is well over the amount of the Performance Bond, and although in the face of my finding at paragraph 66.11 hereof that the termination was not
G properly effected and not valid and because of which the Respondent is not entitled to claim Damages, the utilisation of the Performance Bond which is not tied to termination, was not wrongful.

[46] The learned judge held that since the arbitrator had considered cl. 37 and cl. 40 on the LAD; since the arbitrator had found that the utilisation of
H the performance bond is not tied to the determination of the plaintiff's employment; and since the amount due for the LAD is significantly more than the amount of the performance bond, the arbitrator was right to rule that the defendant's right to the proceeds of the performance bond is not related to the termination but to the losses suffered by the defendant and/or the
I amounts due to the defendant arising from the breach or breaches of the contract by the plaintiff. And since the arbitrator had given his reasons as to why the utilisation of the performance bond is not wrongful, the learned judge declined to disturb the arbitrator's findings.

[47] Her Ladyship further held that there was no error of law in the interpretation and findings of the arbitrator on the performance bond, because the plaintiff had earlier on claimed/applied for an injunction to restrain the defendant from calling on the performance bond and the plaintiff's claim had been dismissed by the court. A

[48] On question 2, the learned judge agreed with the defendant that the reference to LAD by the arbitrator in determining the utilisation of the performance bond does not mean that the arbitrator had imposed LAD on the plaintiff, but that the arbitrator had merely provided a comparison to show that if the defendant did claim for LAD, the amount due to the defendant will be more than the amount of the performance bond. The learned judge therefore found that question 2 did not arise from the award. B C

[49] With respect, we disagreed with the learned judge. The arbitrator did not state that he was making such comparison and from our reading of the award, in particular paras. 49.2, 49.3 and 49.6 quoted above, the arbitrator had in fact expressly found, pursuant to cl. 40 of the COC, using the provisions of the LAD, that there was amount due to the defendant, which amount was more than the amount of the performance bond. D

[50] Whether or not the arbitrator had merely referred to the LAD (which was not pleaded and counterclaimed) as comparison for the losses that the defendant may recover from the plaintiff which losses were found to be significantly more than the amount of the performance bond, the pertinent question to ask is whether the arbitrator erred in law in his conclusion on the defendant's entitlement to the performance bond, that the defendant's utilisation of the performance bond 'was not unlawful'. E F

[51] In our view, as a matter of law, the arbitrator was not entitled to reach the conclusions that he did. The lawfulness of the utilisation of the performance bond depends on the terms of the COC, how the parties have raised the issue and what the responses were. It was not open to the arbitrator to dwell into areas or consider any other provisions of the COC which were not relied on, pleaded or counterclaimed. G

[52] In relation to the performance bond, the plaintiff's claim as pleaded in para. 46 of the points of claim was that the defendant's termination was wrongful and that the defendant had proceeded to make a demand on the performance bond based on such wrongful termination. In response, the defendant, in para. 34 of the points of defence claimed that the contract had been determined on 11 May 2010 due to the plaintiff's complete suspension of works, that it had *inter alia* exercised its rights and obligations under the contract, and that it "continued to make demand on the performance bond under the provisions of the COC as the claimant had failed to perform its obligation under the contract". H I

[53] In its submissions, the defendant took the position that under cl. 50 of the COC, it was entitled to forfeit the performance bond and use the monies to set-off for additional costs incurred in appointing a third party to complete the contract. The defendant further submitted that because the performance bond was an unconditional bond, it was entitled to call upon the bond wherever it decides. Since the plaintiff was in breach, the determination was valid; and this in turn meant that the call and utilisation of the performance bond was within its contractual rights.

[54] The learned arbitrator had found that the determination was invalid; that "a condition precedent to claiming the amounts incurred in utilising a completion contractor to complete the uncompleted works, has not been met" (see para. 75.2 of the award). Given such a finding which remains unchallenged, the defendant would not in law, be entitled to claim for its losses, including costs incurred in mitigating its losses. The arbitrator has as much admitted this to be the case (see paras. 76.1 to 76.3 of the award).

[55] In attempting to do justice and adjudging that the losses should lie where they fell, the arbitrator however, failed to have regard to the fact that the defendant had called and utilised the performance bond for its "additional costs" in completion. Such costs are actually the losses that are supposed to lie where they fell. In other words, the defendant was to bear those costs itself. While the defendant's right to cash in on the performance bond was said to be related to the losses apparently suffered by the defendant, and not related to the termination, the encashment of the performance bond on 4 December 2012, after the termination on 11 May 2010 together with the pleas and submissions taken by the defendant indicate quite categorically, that the performance bound was utilised to cover the defendant's losses. Under such circumstances, the law does not countenance a result and conclusion that was reached by the arbitrator.

[56] We also agreed with the plaintiff that there was no legal basis for the arbitrator to consider and justify the utilisation of the performance bond by reference to the imposition of LAD. There was no plea or counterclaim to this effect; and in any event, the conditions for such an imposition were not met. No CNC was issued and more importantly, the date of completion (11 March 2011) has yet to lapse when the contract was determined on 11 May 2010.

[57] Questions 1 and 2 were thus questions of law arising out of the award ie, whether, in dismissing the defendant's counterclaim, the arbitrator erred in law in holding that the defendant could retain and recover the amount of the performance bond for losses suffered by the defendant using the agreed provisions of the LAD, which was not pleaded. The conclusion of the learned arbitrator on the utilisation of the performance bond falls under para. (b), (d) and (e) of the tests set out in *Far East Holdings (supra)*.

Conclusion

[58] The arbitrator had dismissed the defendant's counterclaim, yet he held that the defendant was entitled to the performance bond as he found that the amounts due to the defendant as LAD alone is significantly more than the amount of the performance bond. Although the arbitrator found that the performance bond was not tied to the termination of the plaintiff's appointment, in our judgment, there was no basis in law for the arbitrator to find that the defendant was entitled to the amount of the performance bond as losses suffered by the defendant, having dismissed the defendant's counterclaim.

[59] We therefore allowed the appeal with costs and we set aside the order of the High Court. The final award dated 15 July 2016 was varied to the extent that the plaintiff's claim in para. 49(g) of the re-amended points of claim for payment of the performance bond was allowed, with interest at 5% per annum from the date of the award until realisation.